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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

H. F. ALLEN ORCHARDS, et al., ELBERT B. SCHINMANN, et al.,
R. E. REDMAN & SONS, INC.,
Petitioners,

VS.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The specific important questions presented pursuant to United States Supreme Court Rule 17(.1)(c) necessarily include, in their context, the following frame of reference which is incorporated into each question:

A. Petitioner water users are three hundred thirty-four individuals, corporations and other entities in the Yakima, Washington basin who suffered catastrophic damages in 1977 because of the failure of the United States, through the Bureau of Reclamation, to comply with express and necessarily implied terms of controlling contacts for delivery of irrigation water.

B. This case centers on the reclamation program in the Western United States, and more specifically on the relationship between (1) the United States, through the Bureau of Reclamation (Bureau), and (2) the owners of water rights and users of water collected and distributed by the Bureau (which relationship is delineated by the Reclamation Act of 1902, as well as a series of contracts, including a consent decree between the Bureau and irrigation and reclamation districts, which districts act as a conduit for contracting with the Bureau on behalf of the water users).

Accordingly, the specific important questions include:

1. Whether the lower courts erred in holding as a matter of law that the United States, through the Bureau, did not breach its contractual obligation to petitioners when it failed to calculate in a competent and timely manner the total water supply available for irrigation in the Yakima Valley Project in 1977 in complying with the contracts' requirement of proration of water when:

(a) The Bureau informed petitioners in February, 1977, that there would be insufficient water available to meet their needs, when such water was in fact available, and the erroneous information was due to an admitted and inexcusable failure by the Bureau to correctly compute the extant water in its system;

(b) The petitioners must know in February of each year, the amount of water that will be available to them during the growing season, to permit appropriate crop selection and the making of other critical decisions;

(c) The Bureau undertook to inform the petitioners in February, 1977 that there would be insufficient water available to meet their needs, according to its own understanding and application of its contractual obligations and the intent of the contracting parties;

(d) The Bureau is fully aware of the petitioners' need for early information; and

(e) In reasonable reliance on the erroneous information the petitioners received, (and in spite of efforts to mitigate damages) petitioners suffered a loss in excess of twenty-two million dollars.

2. Whether the announcement by the United States that it would not deliver the water to which petitioners were entitled, amounted to an anticipatory breach, or a repudiation, of the controlling contracts.

3. Whether the entire contracts are rendered illusory when the right of petitioners to know the amount of water that will be available to them in the growing season is eliminated as an enforceable contractual right.

4. Whether the lower courts misapplied existing law when they failed to recognize that the United States stands in a fiduciary relationship to the water users, and the correlative rights and duties that flow therefrom.

5. Whether the opinions below conflict with controlling precedent and/or are repugnant to the strong public policies upon which water law and reclamation law in the United States are founded.

PARTIES

Petitioners, who were plaintiffs in three consolidated cases in the Claims Court, and appellants in the United States Court of Appeals for the Federal Circuit, are three hundred thirty-four individuals, corporations and other entities who are shareholders in fifteen irrigation and reclamation districts. Petitioners are water users and own the water rights which are the subject matter of this litigation. They are farmers. Each of the petitioners, the real parties in interest in this case, is identified by name and district at pages A-34 through A-42 of Appendix D submitted herewith.

Respondent (defendant in the Claims Court and Appellee in the United States Court of Appeals for the Federal Circuit) is the United States.

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VS.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Claims Court opinion, dated February 21, 1984, is reported at 4 Cl.Ct. 601 (1984) and is pages A-9 through A-30 of Appendix B submitted herewith.

The opinion of the United States Court of Appeals for the Federal Circuit dated December 10, 1984, is reported at 749 F.2d 1571 (1984), and is pages A-1 through A-8 of Appendix A submitted herewith.

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit entered judgment on December 10, 1984. A petition for rehearing was timely filed. On January 30, 1985, the Court of Appeals entered an order denying that petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

The statutes involved in this case include the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*

43 U.S.C. § 523 is reproduced on page A-112 of Appendix H submitted herewith. Nothing with sufficient particularity to justify reproduction appears in any other section of the Reclamation Act.

STATEMENT OF THE CASE

The Court of Appeals for the Federal Circuit has issued an opinion contrary to the letter and spirit of decisions of this Court, and with established precepts of water law, contract law, and the law of fiduciaries. The Court of Appeals erred in holding, as a matter of law, that the United States, through the Bureau of Reclamation (hereinafter "Bureau") did not breach its contractual obligation to petitioners (hereinafter "farmers")[1] when the Bureau informed the farmers in February, 1977, that

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[1] In this petition:

(a) "the farmers" refers to the petitioners in this action, all of whom are engaged in the enterprise of farming in the Yakima Valley;

(b) "water users" refers to the larger category of which the farmers are a part: i.e., all those engaged in irrigation and reclamation, pursuant to contracts between the United States, through the Bureau of Reclamation of the Department of the Interior, and the various reclamation districts (however denominated).

there would be insufficient water available to meet their farming needs. The Court of Appeals reached this decision in spite of the fact (a) that the controlling contracts expressly and impliedly obligate the Bureau to make a timely and competent computation, proration, and allocation of the total water supply available to the farmers in short water years, prior to the beginning of the irrigation season; (b) that such water was in fact available; and (c) that the erroneous information given by the Bureau to the farmers was due to the Bureau's admitted and inexcusable failure to correctly compute a scientifically computable fact, namely the extant water in the system. The Court of Appeals also failed to recognize the fiduciary relationship between the Bureau and the water users and the relationship's correlative rights and duties involved in this case.

The controlling contracts consist of

> (1) a stipulated judgment dated January 31, 1945 in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, Civil No. 21, District Court of the United States for the Eastern District of Washington, Southern Division (hereinafter "Consent Decree", submitted herewith on pages A-77 through A-109 of Appendix F), which was the subject of review by the Ninth Circuit Court of Appeals in *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 626 F.2d 95 (9th Cir. 1980); and
>
> (2) a series of individual repayment contracts and amendments thereto[2] between the United States government and the farmers for delivery of water for the growing of crops, executed for the farmers by the irrigation districts.[3]

The Consent Decree, without dispute, requires a *proration* of the total water supply available (hereinafter "TWSA") in short

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[2] Much of the language and concept of the Consent Decree was introduced by amendment after 1945 into the actual contracts between the Bureau and the several districts.

[3] An example of such repayment contract is the Roza Irrigation District Amendatory Repayment Contract (1953), submitted herewith on pages A-113 through A-147 of Appendix I.

water years. See Argument, Point II, *infra*. The necessity of proration is undisputably a contract term. Both the trial and appellate courts held that the Bureau is required under the Consent Decree to compute and distribute the TWSA.[4]

The heart of this dispute centers on the events in early 1977. On February 7, 1977, the Yakima Office of the Bureau of Reclamation undertook to prorate the available water pursuant to the contracts, according to its own understanding and interpretation of the contractual proration process and the intent of the contracting parties. By an egregious, admitted error in the process, the Bureau grossly understated to the farmers the amount of water available for proration prior to the time when the farmers were to plant crops based, in the main, on a miscalculation in applying an erroneous formula to available water. (See Argument, Point II, *infra*).

In reliance upon the Bureau's announcement, the farmers took a variety of actions: they let acreage lie fallow, reduced planted acreage, substituted less lucrative crops requiring smaller amounts of water, drilled wells, and literally dug up whole crops and moved them out of the valley. When it became apparent many months later that the water was in the system all along, it was too late, and the farmers suffered catastrophic losses.

It is obvious and has in fact been conceded by the Bureau that unless the farmers know what water will be available to them early in the year they cannot properly plan and plant. In spite of this, both courts held that the fact that the Bureau egregiously erred was without consequence, since "negligent performance of a noncontractual duty cannot be the basis of a breach of contract claim." *H. F. Allen Orchards v. United States*, 749 F.2d at 1576.

This is the heart of the court's error. Without timely information as to the water available, the fact that water may later turn out to be available is not significant. To require the farmers

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[4] The Court of Appeals reversed the Claims Court on some parts of its ruling, notably that the farmers were not real parties in interest and therefore unable to prosecute this action. *H. F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984).

to merely plant-and-hope, when information that will permit proper planning and give security is readily available to the Bureau, cannot meet the requirement of good faith and fair dealing inherent in every contract, particularly one grounded in a fiduciary relationship.

If, as conceded, the Bureau had a duty to compute and prorate the TWSA, it had a duty to

(1) compute it *competently*; and

(2) share that information with the farmers who own the rights in the water.

Without these, the obligation is meaningless.

The decisions below create a situation in which contractual rights which have been assumed by the farmers to be fundamental have been found to be illusory. The courts below have held that the Bureau may deny the farmers information as to the amount of water in the Bureau system that will be available to the farmers at the time of year the farmers absolutely require such information. Without this information, the farmers do not know where they stand on questions essential to the conduct of their business. Without this knowledge, the contracts are hollow and the system unworkable. At a time when agriculture throughout the country is facing almost unprecedented economic problems, the farmers of the West do not deserve this additional burden.

The Court of Appeals also erroneously and mistakenly characterized this case as one centering on forecasting. *H. F. Allen Orchards v. United States,* 749 F.2d at 1573-1575. The weather forecasting analogy is inappropriate and irrelevant to this case, which centers on *extant* water in the Yakima Project and the Bureau's erroneous computations thereof, rather than weather forecasting. See Argument, Point II D *infra.*

The decisions below are also repugnant to firmly established, and clearly prudent, public policies which have defined water rights and reclamation practice since their infancy in this country, as well as an abrogation of the fiduciary relationship between the government and the farmers.

Commencing with (and in some particulars preceding) the Reclamation Act of 1902, also known as the Warren Act (43 U.S.C. § 371, *et seq.*), and continuing to the present day, government and private persons have cooperated on a massive scale to bring to pass the reclamation of millions of acres in the arid West from idleness into productivity through the use of irrigation.[5]

The role of government has been to collect, store and distribute water. The purpose of such collection, storage and distribution specifically articulated in the Warren Act—is to bring the water into the hands of the water users who own the water rights and who perform the actual acts of reclamation. 43 U.S.C. § 523; see also *Bryant v. Yellen*, 447 U.S. 352 (1980); *Ickes v. Fox*, 300 U.S. 82 (1937);[6] *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941).

The role of the farmers and other users of the water is to perform the acts of reclamation.[7]

A clearly defined structure has been gradually built, through the decades, out of statutes, regulations, case law and a continuing pattern of custom and dealing. In this structure, the respective roles of (1) the Bureau, the federal presence in the ongoing drama; (2) the various irrigation and reclamation districts formed as conduits between the Bureau and water users, and (3) the

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[5] The history of American reclamation is documented in prior decisions of this Court, notably *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) and *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896). These decisions illuminate the monumental, and often heroic, dimensions of the enterprise. The contributions of reclamation to the growth and prosperity of the Western United States can hardly be overstated.

[6] It is not without significance that *Ickes v. Fox*, one of the landmark reclamation decisions of this Court, dealt with the Yakima project.

[7] Unlike many government projects, reclamation was intended to pay, and has paid, for itself. III Kinney, *A Treatise on the Law of Irrigation*, p. 2338 (Bender-Moss Co. (1912)). See also *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

ultimate users, who are usually (as here) the actual owners of the water rights, have become defined and understood.

Since these matters are controlled by statutes, case law, and bureaucratic regulation, the farmers and other water users are forced to function within the system created by the government. The water users have no options, and in a real sense are at the mercy of the government.

In spite of this coercive element, this relationship has been productive. It has been productive largely because each of the three groups of actors have known their own rights and duties and the rights and duties of the others, and the rights have been exercised and the duties performed in an atmosphere of pervasive trust, generosity and confidence.[8]

In view of the continual contacts that occur between the actors engaged in reclamations and the need of water users to make and act upon long-term plans and decisions, this reciprocal trust has been of inestimable value, central to the success of the enterprise. This trust has been substantially undermined by the events that occurred in the Yakima (Washington) Valley in 1977, commencing with a February announcement by the Bureau that the farmers would receive only seven percent (7%) of their entitlement that year, even though there was enough extant water in the system to meet historical needs, and in the judicial actions that followed (discussed more fully below).

Especially in light of the above-described fiduciary relationship, the equities in this case are compelling. The farmers found themselves in a situation beyond their control. They behaved prudently, even diligently, doing all they could to prevent or mitigate damage. The harm they suffered was due solely to the Bureau. The Bureau has acknowledged its culpabilities ("we blew it", said the project superintendent). The damage could and should have been avoided.

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[8] It is apparent and has been expressly recognized, that reclamation activities advance the public interest. See, e.g. *Bryant v. Yellen*, 447 U.S. at 375.

The economic dislocation and human misery which resulted from the Bureau's multiple error has been enormous. The incident was a cause celebre in central Washington, and has generated reams of newspaper copy (much of which is, with authenticating declarations, in the record below). The events of 1977 were catastrophic for the farmers. Their aftermath has brought a loss of trust, and a sense of confusion and futility.[9]

BASIS OF JURISDICTION IN CLAIMS COURT

The basis for federal jurisdiction in the court of first instance, the Claims Court (the Court of Claims at the time the action was instituted), is the Tucker Act, 28 U.S.C. §1491.

ARGUMENT

I

THE FEDERAL CIRCUIT DEPARTED FROM PRECEDENT OF THIS COURT IN NOT RECOGNIZING THE FIDUCIARY RELATIONSHIP WHICH EXISTS BETWEEN THE UNITED STATES AND WATER USERS

Not only are the farmers and the Bureau bound by contract (see Statement of the Case and Argument, Point II); they stand in a special fiduciary relationship which enhances the Bureau's obligations.

Nevada v. United States, 103 S.Ct. 2906 (1983) is instructive. After discussing the special "obligation of trust" (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)) the

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[9] Because this is a review of a summary judgment, the farmers are entitled to have the facts stated in the light most favorable to them. However, an effort has been made to make this presentation accurate, balanced and fair. To the degree that disputed issues of material fact exist (and there are many of these) the lower courts, of course, erred on a ground wholly independent of those here presented, in granting summary judgment.

government bears to Indian tribes, this Court noted that the government assumed obligations of similar gravity in relation to reclamation of private lands under the Reclamation Act. 103 S.Ct. at 2917. The opinion addresses the tension placed on the government in this conflict in claims to water rights between two groups with whom the government bears a special trust relationship.[10]

In an analogous context (Indian timber lands), this Court also recently recognized that a special "trust relationship" imposes a high standard of performance on the government, and "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *United States v. Mitchell*, 103 S.Ct. 2961, 2973 (1983).

That the Bureau's responsibility to the farmer-water users is a fiduciary one has been explicitly stated and implicitly acknowledged by this Court for almost half a century. See, *e.g.*, *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 614-615 (1945); *Ickes v. Fox*, *supra*, 300 U.S. at 95; *Ide v. United States*, 263 U.S. 497, 505-506 (1924). See also *Lawrence v. Southard*, 73 P.2d 722, 728-729, 192 W. 287, 299 (1937).

By failing to recognize this trust relationship, and by reaching a result inconsistent with fiduciary principles, the Court of Appeals has:

(1) decided an important question of law central to the functioning, as intended, of an established and vital federal program (reclamation) in conflict with applicable decisions of this Court; and

(2) thrust distress into the lives of hundreds of thousands of water users who have previously dealt with the United States in an atmosphere of confidence and trust.

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[10] In his concurrence in *Nevada v. United States*, Justice Brennan offered this thought on a different point, but nonetheless of striking applicability to this case.

> [T]he law can and should fix resposibility for loss and destruction that should have been avoided. 103 S.Ct. at 2926.

The Court of Appeals' holding is entirely at odds with the rights and duties inherent in this fiduciary relationship. A recognition of the fiduciary relationship between the Bureau and the farmers would necessarily mandate a finding that the Bureau had the duty to compute the TWSA in a timely and accurate fashion, for communication of the TWSA to the farmers is clearly mandated by the high fiduciary duty of a stakeholder, carrier or trustee as recognized by the Bureau in the Vissia Report[11] (App. E, p. A-63)[12] and in its own prior practice. See Restatement (Second) of the Law of Trusts, § 170, § 173, Note(d) (Duty to communicate all material facts which trustee knows or should know); § 174 (Duty to exercise reasonable skill and care).[13]

II

THE VITAL BUT FRAGILE RELATIONSHIP BETWEEN THE UNITED STATES GOVERNMENT AND WATER USERS IN THE JOINT RECLAMATION EFFORT HAS BEEN RUPTURED BY THE DECISIONS BELOW

A. What Was Certain Is Now Uncertain

As set out above, the relationship between the Bureau, the districts and the farmers is controlled by the Consent Decree and a series of repayment contracts and amendments thereto.

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[11] "Vissia Report" refers to a document prepared in mid-1977 by the Regional Office of the Bureau (Boise), in response to a request from Keith Higginson, Commissioner of the Bureau, to investigate the events herein described. Prepared under the direction of Rod Vissia, Regional Director of the Northwest Regional (Boise) Office of the Bureau of Reclamation, its full title is *Review of 1977 Water Supply Estimates Yakima River.* Reproduced entirely in Appendix E at pp. A-43 through A-76 , the Vissia Report concedes the nature and scope of the Bureau's error.

[12] "App." will hereafter refer to the Appendix submitted herewith.

[13] In *United States v. Mitchell,* 103 S.Ct. at 2973, this Court cited the Restatement (Second) of the Law of Trusts, in defining the fiduciary standard to which the government is held in trust relationships. The sections of the Restatement cited in the text bear directly upon this action and would *preclude* the result reached.

By its terms, the Consent Decree constituted "a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources" to the districts and water users. App. F, p. A-105.

The Bureau's duty under the Consent Decree was clearly articulated in *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 626 F.2d 95, 97 (9th Cir. 1980):

> "[T]he Bureau was obligated to distribute the available water according to the priorities of the parties that had been established according to the law of the State of Washington . . . The consent decree established an allocation schedule which defined the obligation of the Bureau of Reclamation 'to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the Wapato Indian Irrigation Project.' "

As noted by the Ninth Circuit, the Consent Decree defines the Total Water Supply Available (herein "TWSA") for delivery as being constituted by that amount of water available in any year from three components:

> (1) from *natural flow* of the Yakima River, and its tributaries,
>
> (2) from *storage* in the various government reservoirs on the Yakima watershed, and
>
> (3) from "*other sources.*" App. F, p. A-103; emphasis added.
>
> "Other sources" means return flow. See pages 13-14, *infra.*

In years in which there is sufficient water available in the system to meet entitlements, all goes well. In water-short years, the Consent Decree requires that the TWSA be computed and distributed *first* proportionately to the senior water holders ("nonproratables"), and *then* proportionately to the remaining water holders ("proratables"). App. F, p. A-103.

All the petitioners in this action are proratables, at least as to the matters in controversy.

It is important to note that these events occurred in the Yakima Valley in Eastern Washington, where a model reclamation project[14] has been in place since 1905.[15] The Yakima Valley is the principal home of the celebrated Washington Delicious Apple. Most of the mint and hops grown in this country, and a representative variety of other crops, come from the valley. The Yakima Project is a prototype of what a reclamation project should be. It is self-supporting and has generated income of a multiple of its cost.[16]

On February 7, 1977, the Yakima office of the Bureau issued a shocking and unprecedented announcement: proratable users would receive only seven percent (7%) of their entitlement during 1977. F.C. App. V, p. 0822. The supposed factual premise of this announcement was the Bureau's conclusion that only 1,200,000 acre feet of water, substantially less than the normal supply, would be available. The Bureau was wrong in its premise.

Upon being informed that insufficient water would be available to them for their usual crops in 1977, the farmers immediately began to consider their remaining options. The plans which had been formed, assuming traditional water availability, were abandoned. Although the deliveries of irrigation water did not actually begin until April, it is conceded by the United States that Yakima Valley farmers must plan the type of crops which they would plant, make other vital decisions, and take preliminary

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[14] A stylized schematic map of the Yakima Project, showing the six storage reservoirs and the supporting system of diversion dams, rivers, canals and gages, which irrigate 500,000 acres, is presented in App. E, p. A-60.

[15] F.C.App. VII, pp. 1258-1266 (Deposition of William Gray, Superintendent in 1977 of the Yakima office of the Bureau). "F.C.App." refers to the appendix filed in the Court of Appeals for the Federal Circuit.

[16] F.C. App. V, pp. 0805-0806 (1950 Bureau of Reclamation Informational Release).

steps in February and March. F.C. App. VII, pp. 1302-1308 (Gray Deposition); F.C. App. VI, p. 1149 (Deposition of Onni Perala, Chief of the Hydrological Division of the Yakima Project). They must know how much water they will have.

In reliance upon the Bureau's projections, the farmers took a variety of actions described above including letting acreage lie fallow, reducing planted acreage and substituting less lucrative crops requiring smaller amounts of water.

Over the next few months, as the surrealistic events unfolded, the Bureau kept being surprised by finding more and more water in the system. Starting in April, new announcements were issued every few weeks upgrading the reading of available water.

Even though final precipitation levels in 1977 were somewhat lower than the norm,[17] proratables eventually had available seventy percent of their allotment, or about the amount of the historical diversion.[18] By the time it was known that this water would be available, it was too late for the farmers. They suffered catastrophic losses, and the District ended the year with a huge surplus of unclaimed water. F.C. App. VII, p. 1309 (Gray Deposition).

What happened?

Due to egregious error, the Bureau correctly applied only *one* factor of the three-factor Consent Decree TWSA formula. The Bureau simply failed to recognize the amount of extant water in the project works and thus grossly understated to the farmers the amount of water actually available for distribution.

The particular computational errors were two:

(1) Return flow (water returning to the system after diversion for irrigation which is thus available for further

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[17] See App. E, p. A-67. This defuses the Bureau's argument, constructed years after the fact, that the additional water in the system was *really* attributable to heavy rainfall.

[18] "Historical diversion" refers to the water actually diverted over the years pursuant to outstanding entitlements. Most water users do not traditionally claim all the water to which they are entitled by contract.

diversion) was omitted. F.C. App. VI, p. 1099 (Deposition of Larry Vinsonhaler, the Bureau's Chief Regional Planning Officer). As the Bureau acknowledged, the phrase "and from other sources" in the Consent Decree formula is equated with return flow.[19] At least since 1919, the Bureau has recognized the significance of return flow in computations of available water. F.C. App. VII, pp. 1290-1293, 1308 (Gray Deposition); F.C. App. VI, pp. 1168-1169 (Perala Deposition).

(2) Runoff from the Yakima water basin, necessary to determine natural flow, was not computed *at all*; rather, a "guesstimate" not based upon any empirical system whatsoever, was substituted. App. G, p. A-110—A-111 (memorandum from Gray to Rod Vissia, Regional Director of the Bureau). Vissia conceded that this type of guessing departed from Bureau standards. F.C. App. VI, p. 1026 (Vissia Deposition). This error can only be termed deliberate.[20]

It is not necessary that the particulars of this tragic sequence be spelled out in this document. It is sufficient for present purposes to note that the errors did not involve arcane formulae or esoteric knowledge on the cutting edge of science. One error was simply overlooking one factor in a simple three-factor formula. The other was making a knowing choice to rely on guesses where computations could and should have been made.

B. The Bureau Breached Its Contract With the Farmers

As set forth in the Statement of the Case, the Bureau clearly breached its contract with the farmers by failing to provide them with a proper and timely TWSA computation.

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[19] F.C. App. V, pp. 923-924, 927, 932. (Brief for the United States in *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist., supra.*)

[20] Detailed narrative account of how the Bureau fell into these errors, in context, is found on pp. 20-35, 60-64 of the farmers' Motion for Summary Judgment in the Claims Court and at pp. 8-18, 26-28 in the Appellant's Opening Brief in the Court of Appeals.

While the facts in this case are not identical, *Owyhee Ditch Co. v. United States*, 126 F.Supp. 429 (D. Ore. 1954) is a persuasive precedent. In *Owyhee Ditch*, the United States breached its contract to deliver water to the plaintiff, when it had sufficient water to meet its contractual obligations, because it negligently discharged water from that system. Here, the United States also had sufficient water in its reservoir system to meet its contractual obligations, but negligently (and intentionally) failed to correctly compute the amount of that water as required by contract, thus denying the plaintiffs of its benefit. Logically, the same result would follow in both cases.

The decision of the Federal Circuit will have ramifications far beyond the party litigants. The language in the repayment contracts in the Yakima Basin is largely boilerplate, drafted by the Bureau, and widely used. "[T]he contract between these associations and the Federal Government . . . must be in accordance with the Government's method . . . or not at all." III Kinney, *A Treatise on the Law of Irrigation*, p. 2338 (Bender-Moss 1912).

What was true in 1912 is even more true today. The Bureau has not gotten less bureaucratic with the passing years. This decision undermines the network of contracts and agreements of not only the water users of the Yakima project, but of water users elsewhere throughout the West as well. Because of the lower courts' rulings, the Bureau now has *no* contractual obligation in short-water years to share with water users, who own *vested* and *absolute* rights in the water in question (*Ickes v. Fox*, 300 U.S. at 96-97), the basic and necessary information it has about how much of their water is available to them. Water users plant at their own risk. The climate of trust and shared enterprise that has been characteristic of reclamation work has been ruptured. It is not hyperbole to state that the situation is intolerable.

C. In Any Event, the Duty to Inform the Farmers of Available Extant Water is Necessarily Implied in the Contracts

It is axiomatic that a contract must be interpreted to give a meaning to all parts, and specifically to avoid making the contract illusory. 3 Corbin on Contracts, § 546 (1960).

A contract must be construed according to the intent of the parties, as demonstrated from the whole contract and its purposes and not from any single detached part alone. *North American Philips Co. v. United States*, 358 F.2d 980 (Ct.Cl. 1966); *Stender v. Twin City Foods, Inc.*, 510 P.2d 221, 82 Wash.2d 250 (1973).

> "In construing a contract, *it is not sufficient to look to the cold language alone.* Words in a contract are used to convey the meaning and intent of the parties. Such intent is gleaned not only from what is expressly stated therein *but also from what is of necessity implied from the language used.*" *General Finance Corp. v. Dillon*, 172 F.2d 924, 927-28 (10th Cir. 1949) (emphasis added).[21]

Accordingly, a contract imposes not only duties expressly stated but those necessarily implied to give substance and meaning to the express provisions of the contract. *General Finance Corp. v. Dillon, supra; Suess v. Heale,* 416 P.2d 458, 68 Wash.2d 962 (1966).[22] Timely information to farmers as to water available is

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[21] A California case, written by Chief Justice Roger Traynor, illustrates the concept well. In *Langley v. Pacific Gas & Electric Co.*, 41 Cal. 2d 655, 262 P.2d 846 (1953), the California Supreme Court found that the duty to inform a customer of a power outage was necessarily implied in a power supply contract between a power company (P.G.&E.) and a fish hatchery. Justice Traynor determined that this contractual duty to inform plaintiff was necessarily implied because *inter alia* (a) P.G.&E. agreed to furnish plaintiff electricity and to exercise reasonable skill and care in so doing; and (b) P.G.&E. knew that a continuous power supply was imperative to plaintiff and his hatchery.

[22] In tort law, if a party performs an act it has no duty to perform and engenders reasonable reliance, that party must perform the act in a competent fashion or be held answerable for the consequences of its incompetence. *Indian Towing Co. v. United States,* 350 U.S. 61, 69 (1955).

How much more clearly present is the duty to perform competently when the act in question is stated or necessarily implied in a contract, required to enable the benefits of the contract to be enjoyed, and reliance on competent performance is both *known* and *reasonable.*

necessary to give substance and make meaningful the water availability.[23]

This idea pervades many areas of law. The Uniform Commercial Code (§ 2-615(c)) provides:

> "The seller must notify the buyer seasonably that there will be a delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

This duty of the Bureau to timely and competently compute the TWSA is necessarily implied from the contracts in the context of the surrounding facts and circumstances. Without this notification in a short-water year, the Bureau's contractual obligation to deliver water is illusory. Unless the farmers know the TWSA well before actual delivery, they cannot take advantage of the water.

D. The Nature of the Controversy Has Been Critically Mischaracterized by the Lower Courts

It must be stressed that this case deals with water *already* in the Yakima Project in January, 1977, under the Bureau's control, and available to the farmers for their use.

One of the major flaws in the Court of Appeals opinion is treating this controversy as one centering on forecasting. *H. F. Allen Orchards v. United States,* 749 F.2d at 1573-1575. The controversy centers on *extant water.* Weather forecasting cases present wholly different questions of fact, law and equity, and are not helpful even by analogy.[24]

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[23] The act of the Bureau in informing the farmers that they would not get water, when that water was available and belonged to the farmers may also be fairly characterized as an anticipatory breach or contract repudiation. *Roehm v. Horst,* 178 U.S. 1 (1900); Restatement (Second) of the Law of Contracts §§ 243, 250 (1981).

[24] Even with lower-than-average precipitation (Vissia Report, App. E, p. A-67), there was sufficient water in the Yakima Project System in 1977 to meet historical diversions.

E. The Government Concedes the Essential Elements of the Farmers' Case

It is significant to note that the farmers' case was largely built on *concession*. The Bureau, through duly empowered supervisory officials, has conceded that:

(1) The Bureau had a contractual duty to correctly compute the TWSA.[25] App. E, p. A-67 (Vissia Report). This duty specifically includes an early computation of how much water will be directed. "In order that the water users would be aware of the anticipated supplies that they would have available for use in 1977, the TWSA was computed and distributed under the Consent Decree." App. E, p. A-67 (Vissia Report). The Bureau's attempt to compute the TWSA and notify the farmers is a clear *concession by conduct* of the Bureau's obligation in this particular.

(2) The Bureau failed to properly perform this duty and thus breached the contract in that it did not correctly account for the water in its system: "[R]eturn flows had not been properly accounted for if the provisions of the Consent Decree are to be applied."[26] App. E, p. A-71—A-72 (Vissia Report). The runoff "guesstimate" departed from Bureau standards. F.C. App. VI, p. 1026 (Vissia Deposition).

(3) The farmers need to know the water that will be available to them well before April first to make critical farming decisions. The less water available to them, the more limited are their options. F.C. App. VII, pp. 1302-1303; (Gray Deposition); F.C. App. VI, pp. 1096-1097 (Vinsonhaler Deposition).

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[25] Under controlling law, this Court should have given great weight to the Bureau's own interpretation of its duties under the Consent Decree and subsequent contracts. See, *e.g., Chevron, U.S.A. v. National Resources Defense Council,* 104 S.Ct. 2778, 2782 (1984); *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978).

[26] This was expressed with particular pungency by William Gray in a newspaper interview: "We blew it. There's really no other way to say it. There was water in the system that we didn't know we had . . . It's as simple as that– we blew it." F.C. App. VI, p. 1003 (*Yakima Herald Republic,* Friday, Feb. 9, 1979, p. 2.)

(4) The acts of the farmers in reliance on the government's pronouncements, and in an effort to mitigate their losses, were reasonable and appropriate. F.C. App. VII, p. 1303 (Gray Deposition), F.C. App. VI, p. 1097 (Vinsonhaler Deposition), F.C. App. VI, p. 1149 (Perala Deposition).[27]

CONCLUSION

In a decision with a potential for far-reaching disaster, the Court of Appeals has held that contractual rights upon which petitioners in this case and water users in the West generally have come to rely on are in fact illusory. The error goes to the very center of the reciprocal relationship of trust and confidence on which the water users and the United States have based their dealings and decisions in the reclamation program since 1902.

The decision is illogical, inequitable and inconsistent with controlling precedent and public policy. For all the reasons herein stated, this petition should be granted and the judgment below reversed.

Dated: April 29, 1985

Respectfully submitted,

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[27] The concessions, for the most part, were contemporaneous utterances, made during or soon after the Bureau's gaffe was discovered. They are spontaneous and inherently believable. Predictably, during this litigation, the Bureau has attempted to massively recant, disclaim, and reinterpret.